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January 10, 2008

SENT VIA HAND DELIVERY AND EMAIL

Tom Irwin, Commissioner
Department of Natural Resources
State of Alaska
550 West 7th Avenue, Suite 1400
Anchorage, Alaska 99501
Email: tom.irwin@alaska.gov

Patrick Galvin, Commissioner
Department of Revenue
State of Alaska
550 West 7th Avenue, Suite 1820
Anchorage, Alaska 99501
Email: patrick.galvin@alaska.gov

Re: **Request for Reconsideration**
Alaska Gasline Port Authority / AGIA Application

Dear Commissioner Irwin and Commissioner Galvin:

Attached please find the request for reconsideration submitted on behalf of the Alaska Gasline Port Authority. This is being provided to you under the confidentiality provisions set forth under the Alaska Gasline Inducement Act (AGIA) AS 43.90.900. Should you wish to make this request for reconsideration document public please contact me to discuss that further.

Thank you for your consideration of this request for reconsideration.

Sincerely,

ALASKA GASLINE PORT AUTHORITY


William M. Walker, General Counsel

Board of Directors:

Mayor Jim Whitaker, Chairman · Mayor Bert Cottle, Vice-Chair · Merrick Peirce, Treasurer ·
Dave Cobb, Secretary · Luke Hopkins · Dave Dengel · Rex Rock · Randy Hoffbeck · Harold Curran



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Re: **Request for Reconsideration**
Alaska Gasline Port Authority / AGIA Application

Dear Commissioner Irwin and Commissioner Galvin:

The Alaska Gasline Port Authority ("Port Authority") is in receipt of your letter of January 4, 2008, regarding the rejection of the Port Authority's application under the Alaska Gasline Inducement Act ("AGIA") (hereafter "Completeness Determination"). The Port Authority requests reconsideration of the Commissioners' Completeness Determination.¹

¹ See AS 44.37.011(c); AS 44.62.330(b), .540 and AS 38.05.020(b); Alaska R. App. P. 602(a)(2). Additionally, "[I]t is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions." *Macktal v. Chao*, 286 F.3d 822, 825-26 (5th Cir. 2002) (citing *Belville Mining Co. v. United States*, 999 F.2d 989, 997 (6th Cir.1993); *Dun & Bradstreet Corp. v. United States Postal Service*, 946 F.2d 189, 193 (2d Cir.1991); *Gun South, Inc. v. Brady*, 877 F.2d 858, 862 (11th Cir.1989); *Iowa Power & Light Co. v. United States*, 712 F.2d 1292, 1297 (8th Cir.1983); *Trujillo v. General Electric Co.*, 621 F.2d 1084, 1086 (10th Cir.1980); *United States v. Sioux Tribe*, 222 Ct.Cl. 421, 616 F.2d 485, 493 (1980); *Albertson v. FCC*, 182 F.2d 397, 399 (D.C.Cir.1950)). See also *Cinque v. Montgomery County Planning Bd.*, 918 A.2d 1254, 1261 (Md. Ct. Spec. App. 2007); *In re Van Orden*, 383 N.J.

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Based upon the facts and information set forth below it is in the best interest of the people of the State of Alaska ("State") that the Completeness Determination rejecting the Port Authority's application under AGIA be reconsidered and reversed. The Port Authority requests that its November 30, 2007 application, along with its December 18, 2007 supplemental application submitted in response to a request from the AGIA licensing office, be accepted for further consideration under the AGIA process and that the Port Authority's project be presented for public review and comment. As requested, certain documents are attached as factual evidence and background.

I. The Port Authority's Timely December 18 Submittal Should be Considered.

A. Extenuating Factors Designed to Thwart the AGIA Process Impacted the Port Authority's November 30 Application.

The Port Authority was formed by the North Slope Borough, Fairbanks North Star Borough, and City of Valdez in 1999 for the purpose of "building or causing to be built" an all-Alaska gas pipeline to move Alaska's vast resource of natural gas from Alaska's North Slope to Alaskans and the global market. Towards that end, the Port Authority has worked tirelessly under multiple State administrations to bring its project to fruition.

Over the past 12 months, the Port Authority has met with numerous pipeline and liquefied natural gas ("LNG") companies in an effort to put together a consortium of participants in the AGIA process. Some companies made it clear that, given their present relationship with North Slope producers, they would not be willing to participate in the AGIA process. The Port Authority has learned there has been significant pressure applied to various companies to dissuade them from submitting AGIA bids.

For instance, in an interview with Mid-America Energy Holding Company² ("Mid-America") CEO, David Sokol, on August 12, 2007, stated:

It has been startling . . . 'there have been quite a number of people trying to dissuade us from applying . . .' When asked if Mid-America and Kern River would submit a gasline application with

Super. 410, 891 A.2d 1257, 1263 (App. Div. 2006); *Moe v. Sex Offender Registry Bd.*, 444 Mass. 1009, 829 N.E.2d 1087, 1089 (2005).

² The parent company of Mid-America is Kern River Gas Transmission Company, which has served as Mid-America's lead for the Alaska gasline project.

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partners, Sokol, said yes, but he would not reveal the identity of those partners because he was concerned they would be subjected to the same pressure Mid-America has been. 'In light of pressure that has been put on us, we think we are doing our potential partners a favor by not identifying them.' He said, noting Mid-America would name its partners when it was necessary to do so under the AGIA process.³

As is now known, and much to everyone's surprise, Mid-America did not submit an AGIA bid.

The Port Authority has experienced similar pressures and difficulties in its efforts to submit an application under AGIA. In June of 2007, the Port Authority entered into a relationship with a major U. S. pipeline company (the "Pipeline Company"). The Pipeline Company is a large pipeline company that owns and operates thousands of miles of pipelines in the United States. Early in the relationship with the Port Authority, Pipeline Company representatives proposed an arrangement with the Port Authority whereby it and the Port Authority would create a consortium without an LNG partner.

The Port Authority, however, was interested in adding a company with LNG expertise to the consortium. Accordingly, the Port Authority continued to search for an LNG participant member to join with the pipeline consortium member. This was accomplished in early August 2007, when the Port Authority joined forces with a major LNG company (the "LNG Company") and the Pipeline Company, to form a Consortium ("Consortium" and together "Consortium Companies") to submit an AGIA application.

Shortly thereafter the two Consortium Companies insisted that for them to move forward as an applicant under AGIA, the Port Authority could not be an active participant. The Port Authority was required to make a monumentally difficult decision. Since its enabling ordinances mandate that the Port Authority "build, or cause to be built" a gas pipeline, the Port Authority decided to allow the newly formed All Alaska gas line Consortium to prepare and submit an AGIA application without its direct participation or involvement. The Port Authority made its decision considering the best interest of the AGIA process and in order to increase the likelihood of a successful application.

The Consortium requested immediate access to proprietary data prepared for the Port Authority by the Bechtel Corporation ("Bechtel"). This data is the

³ *Petroleum News*, August 12, 2007.

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result of work performed for the Port Authority over many years and was valued by Bechtel at over \$8 million. The requested data consisted of project design, execution planning, cost estimates and other preliminary technical work. Allowing the Consortium access to this extensive and proprietary data not only enabled the Consortium to save a significant amount of time and money but was essential to their timely, conforming application.

Upon the Consortium's request, the Port Authority immediately granted full access to its Bechtel data for updating and inclusion in the AGIA application. An agreement between the parties specified that in the event the Consortium decided not to submit an application under AGIA, all of the project-related Bechtel data, including any updated work performed and all other materials connected with the application, would be immediately made available to the Port Authority to enable it to conclude the bid work for its own submittal.

On October 17, 2007, the Port Authority was notified that the Pipeline Company had elected not to move forward with an application under AGIA. When asked for a reason, the Port Authority was told the decision to withdraw from the application process had nothing to do with the economics of the project, but rather was a company "business decision."

It then became questionable whether the LNG member of the Consortium would file an application without the Pipeline member. Upon withdrawal of the Pipeline Company from the Consortium the LNG Company informed the Port Authority that it would not submit an AGIA application. In fact, it stated on November 2, 2007, that one option it was considering was to "allow AGIA to fail" and then see what options are available from the State following that failure. The Port Authority expressed strong disagreement with this approach. A few days later, the Port Authority was informed by the LNG Company that it would submit an AGIA application.

At this point the Port Authority decided to submit an application under AGIA independently of the LNG Company to absolutely guarantee that an All Alaska gasline project was represented. In order to prepare a conforming application, the Port Authority immediately served written notice upon both Consortium Companies requesting all of their bid data, as well as access to the updated Bechtel data, as provided by the Consortium agreements.⁴ Unfortunately, the Consortium Companies refused to provide the requested information to the Port Authority and data prior to the November 30, 2007 application due date.

⁴ See Exhibit A attached.

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Nevertheless, the Port Authority was informed by the LNG Company that it would be submitting an application under AGIA. Since the Port Authority did not have access to Bechtel's updated analysis and it was not possible to convert the original Bechtel work product to a usable form in the time available, in its application submitted on November 30 the Port Authority, after consultation with the Administration about the dilemma, had no other option but to incorporate by reference the Bechtel data which was to be part of the LNG Company's application.

Concurrently, the Port Authority also began to assemble another consortium for the application submission. While those efforts were quite successful, given the proximity in time to the application due date, it soon became apparent that there was insufficient time for the Port Authority to both prepare its own AGIA application as well as negotiate and prepare consortium agreements. Therefore, the Port Authority elected to spend the precious little time left before the AGIA application due date to concentrate on the preparation of its application, leaving finalizing a new consortium until after application acceptance.

The Port Authority, in a two-week period, prepared and compiled its application in reliance upon an application to be submitted by the LNG Company. Its timely application was submitted to the AGIA Licensing Office on November 30, 2007.

B. The Port Authority's December 18 Submittal was Responsive to the Commissioners' December 11 Clarification Request.

The Port Authority was stunned to learn after the expiration of the application due date on November 30, 2007 that the LNG Company had not submitted an application,⁵ contrary to statements to the Port Authority that it planned on doing so. The Port Authority immediately began a very aggressive campaign to obtain release of the Bechtel data to which it was entitled and had attempted to incorporate into its application by reference.⁶

After limited discussions with the Administration outlining some of the problems the Port Authority had encountered in obtaining the technical information, on December 11, 2007 the Port Authority received a letter requesting additional specific information and clarification regarding the Port

⁵ See Exhibit B attached.

⁶ See Exhibits C, D and E attached.

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Authority's application submitted on November 30th. The Port Authority's response was due on December 18, 2007.

Following days of strenuous negotiations with the now withdrawn Consortium Companies, the Port Authority was required to execute an unconscionable agreement made under duress whereby the updated Bechtel data would be made available if the Port Authority waived its legal claims against the Consortium Companies. The data was released immediately thereafter at approximately 5 p.m. Texas time on Friday, December 14, 2007. Recognizing the tight timeline, counsel for the Port Authority was on hand in Houston to pick up the electronic CDs and fly them back on the last flight to Anchorage that night. Later that same evening, Bechtel data began to arrive electronically by email. The data was downloaded and printed and the process begun to incorporate the data into a revised application.

Port Authority staff and consultants literally worked around the clock to compile in approximately 72 hours the supplemental data that was requested as missing from the Port Authority's AGIA application. The Port Authority was still receiving additional Bechtel data necessary to support its application as late as Monday, December 17th, the day before the due date to provide the supplemental information.

Much of the requested additional information was information that the Port Authority believed it would have available to use by cross-reference to the LNG Company's application, but that it ultimately did not have access to until the evening of December 14, 2007. Given the extensive scope and significant level of detail in the Bechtel work performed for the AGIA application, a substantially modified application was necessary in order to incorporate the new data. For instance, the technical information obtained from Bechtel included changes in design from the original Bechtel work that the Port Authority had not been made aware of prior to receipt of the updated data (e.g., the size of the LNG facility and the diameter of the pipe from Delta Junction south). The Port Authority believed that it was critically important that the most current cost estimates, technical description, as well as design and project development, execution and regulatory plans, be provided as part of the submission under the AGIA process. The limited original project data from Bechtel that the Port Authority had access to was the foundation for all the project design and economic modeling for the original November 30th AGIA application, and it would have been virtually impossible to modify the assumptions in the original application on a line item basis to account for the updated analysis. Thus the Port Authority made the only practical decision available to it, which was to rework the original application to allow for updated Bechtel analysis and data.

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C. The Port Authority's December 18 Submittal Cures the Deficiencies Noted in the Completeness Determination.

The Completeness Determination in Section 2 sets forth several areas where the Commissioners believes the Port Authority's original November 30, 2007 application was deficient. Each of those areas of alleged deficiency have been cured in the Port Authority's response to your request for additional clarifying information dated December 11, 2007. Those discrepancies, with the cite to the cure referenced in parenthetical, are:

- A. The November 30th application fails to provide a thorough description of a project from the North Slope to market (please see Port Authority's response to your request for additional clarifying information: Application Section 2.1).
- B. The November 30th application fails to provide the required technical viability analysis (please see Port Authority's response to your request for additional clarifying information: Application Section 2.10.2).
- C. The November 30th application fails to provide other required information (please see Port Authority's response to your request for additional clarifying information: (i) Development plan – Application Section 2.2 and new Appendix OO; (ii) Project Execution Plan – Application Section 2.3.1 and new Appendices PP and QQ; (iii) Capital Cost Management Plan – Application Section 2.3.2 and new Appendix PP; (iv) Economic Viability Analysis – Application Section 2.10.1).
- D. The November 30th application does not contain tariff terms as required (please see Port Authority's response to your request for additional clarifying information: Application Sections 2.2.3.4 – 2.2.3.7).
- E. The November 30th application fails to comply with 43.90.130(20) (Please see Port Authority's response to your request for additional clarifying information, Application Sections 2.8 and 2.9).

As can be seen from the Port Authority's supplemental information submitted on December 18, 2007, the wellhead net back price premium from the LNG project proposed by the Port Authority is estimated to be between \$1.10

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and \$2.00 per million British thermal units (depending on volume configurations) over other pipeline projections. The Port Authority's supplemental information significantly enhanced the net present value to the State for the project.

II. Reconsideration Should be Granted and the Port Authority's Application Determined Conforming.

"[I]n exchange for a bidder's investment of the time and resources involved in bid preparation, a government agency must be held to an implied promise to consider bids honestly and fairly."⁷ Under AGIA Request for Application ("RFA") § 1.13.8 an application may not be "corrected, modified, or supplemented" except to the extent requested by the Commissioners under RFA §§ 1.13.10 or 1.17. However, pursuant to RFA § 1.13.10 the Commissioners may request additional clarifying information, and after reviewing the responses if the application is determined to be complete those responses will be considered in evaluation of the application. Similarly, RFA § 1.17 allows the Commissioners to submit data or clarification requests of an applicant, and the Commissioners at their discretion may consider even non-responsive information. These provisions reflect the broad grant of discretion and authority vested in the Commissioners to "exercise the powers and do the other acts necessary to carry out the provisions and objectives" of AGIA.⁸

The Commissioners are thus granted broad discretion to allow the correction, modification, and supplementation of an application by initiating data and information requests.⁹ Here, the Commissioners are uniquely suited to understand how best to meet their objective needs.¹⁰ Since these requests involve agency expertise in the contracting process the Administration need only have had a reasonable basis for requesting and accepting the Port Authority's supplemental information, which means the Commissioners' decision must be supportable by the facts and have a reasonable basis in the law.¹¹

⁷ *King v. Alaska State Housing Authority*, 633 P.2d 256, 263 (Alaska 1981).

⁸ AS 38.05.020(b)(10). The overriding objective of AGIA is to fulfill the constitutional mandate to "maximize benefits to the people of the state from the development of oil and gas resources in the state." AS 43.90.100. Exercising their broad grant of discretion to advance the objectives of AGIA, the Commissioners should accept the December 18, 2007 submittal.

⁹ *Accord Champion Oil Co., Inc. v. Herbert*, 578 P.2d 961, 963 (Alaska 1978) (affirming the legislature's grant to the Department of Natural Resource Commissioner of "broad authority concerning competitive bidding procedures" under AS 38.05.180(a)).

¹⁰ *Powercorp Alaska, LLC v. State, Alaska Indus. Development and Export Authority, Alaska Energy Authority*, 171 P.3d 159, 164 (Alaska 2007).

¹¹ *Id.* (reasonable basis standard applies in review of agency's compliance with state procurement codes) (citing in part *Gunderson v. University of Alaska, Fairbanks*, 922 P.2d 229, 233 (Alaska 1996)).

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Several factors weigh in favor of the Commissioners exercising their discretion to accept the Port Authority's December 18, 2007 supplemented application. First, the above described factual circumstances resulted not only in the Bechtel data being wrongfully withheld from the Port Authority by the November 30 deadline, but also in the frustration of the Port Authority's efforts to incorporate the data by reference. Second, limited discussions and the broad scope of the December 11, 2007 request for supplemental information led the Port Authority to genuinely believe the Administration was giving the Port Authority the opportunity to provide the updated, but previously withheld, Bechtel data as part of the December 18, 2007 filing.

Third, the Port Authority did not have the advantage of knowing information contained in other applications on or before December 18, 2007. Thus since the Port Authority's supplemented information was provided before the bids were released publicly, the Commissioners exercising their lawful discretionary authority to allow supplementation of the application would not materially prejudice any other applicant.¹²

Finally, the primary policy goal of the AGIA process at this stage is to receive as many qualifying bids as possible for analysis and consideration by the Administration and legislature. Given that decisions involving disposition of the State's natural resources create for the Commissioners by express provision and oath a unique constitutional obligation to consider the best interests of the State and the maximum benefit to Alaskans,¹³ the State should err in favor of broadening and not narrowing the competitive field. This is magnified by consideration of the fact that the Commissioners' decision to reject an application as nonconforming (or the ultimate award of a license to another applicant) cannot be appealed,¹⁴ meaning nothing less than the economic fate of Alaska for generations will be determined based on the competitiveness of the AGIA process going forward. Non-prejudicial, one time multi-billion dollar procurement decisions should not be based on technical bid nonconformities where the law grants the Commissioners power to remedy the deficiencies.

¹² See *Lakloey, Inc. v. University of Alaska*, 157 P.3d 1041, 1049 (Alaska 2007) (in Alaska a procurement bid nonconformity is materially nonresponsive only if it gives the bidder a substantial advantage over conforming bidders). See also *Hampton Roads Leasing, Inc. – Request for Reconsideration*, 90-1 CPD 357 (1990) ("Although a nonresponsive bid [under Federal Acquisition Regulations] usually must be rejected, a nonresponsive bid may be accepted where the awarded contract will serve the government's actual needs and no bidder will be prejudiced by the acceptance of the bid.") (citing *Motorola Communications & Elecs., Inc.*, 81-2 CPD 313 (1981)).

¹³ Alaska Const. art. XII, §§ 1,2 and 11.

¹⁴ AS 43.90.130(16).

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III. Conclusion.

After nearly ten years of effort by the Port Authority, including carrying on the work of predecessors dating back as far as the late 1970's, the people of Alaska will suffer a grave injustice if the All-Alaska project is not included as an option in the AGIA process. The Port Authority, in reliance upon that process as well as promises and agreements made with Consortium Companies, provided its foundational proprietary data to the Consortium Companies for use and updating for an AGIA application. When the tables were turned, however, these same Companies chose to withhold the critical application-related data to which the Port Authority was entitled.

Decisions about what project options are available to monetize Alaska's gas should not be made in corporate board rooms in the Lower 48 and other countries. As demonstrated from the Port Authority's supplemental data timely submitted on December 18, 2007 that shows higher netbacks than will be achieved by a pipeline through Canada, the Port Authority's All Alaska Gasline project represents a highly compelling economic proposition for the North Slope producers and the State. It should be given the benefit of further review and public comment through the AGIA process. Anything less will have the effect of the sole source project consideration so soundly rejected by Alaskans and the legislature through the Stranded Gas Act.

The Port Authority urges the Administration to not resort to a "form over substance" determination relating to the most important issue facing Alaska in the coming decades. Thank you in advance for your consideration of this request, and we look forward to discussing it further at your earliest convenience.

Sincerely,

ALASKA GASLINE PORT AUTHORITY

A handwritten signature in black ink, appearing to read "Jim Whitaker", with a stylized flourish at the end.

Jim Whitaker, Chairman

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